

6. The presence in the same transaction of concurrent violations of laws and regulations, other than those enforced by BIS.

7. Other than with respect to antiboycott matters under part 760 of the EAR:

(a) The party has been convicted of an export-related criminal violation;

(b) In the past five years, the party has entered into a settlement of an export-related administrative enforcement case with BIS or another U.S. Government agency or has been found liable in an export-related administrative enforcement case brought by BIS or another U.S. Government agency;

(c) In the past three years, the party has received a warning letter from BIS; or

(d) In the past five years, the party otherwise violated the EAR.

Where necessary to effective enforcement, the prior involvement in export violation(s) of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in determining whether these criteria are satisfied. When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations by an acquired business before the acquisition, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

8. The party exports as a regular part of the party's business, but lacked a systematic export compliance effort.

In deciding whether and what scope of denial or exclusion order is appropriate, the following factors are particularly relevant: the presence of mitigating or aggravating factors of great weight; the degree of willfulness involved; in a business context, the extent to which senior management participated in or was aware of the conduct in question; the number of violations; the existence and seriousness of prior violations; the likelihood of future violations (taking into account relevant export compliance efforts); and whether a monetary penalty can be expected to have a sufficient deterrent effect.

IV. HOW BIS MAKES SUSPENSION AND DEFERRAL DECISIONS

A. *Civil Penalties*: In appropriate cases, payment of a civil monetary penalty may be deferred or suspended. See §764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, BIS may consider, for example, whether the party has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all of the circumstances, such suspension or deferral is necessary to make the impact of the penalty consistent with the impact of BIS penalties on other parties who committed similar violations.

B. *Denial of Export Privileges and Exclusion from Practice*: In deciding whether a denial or exclusion order should be suspended, BIS may consider, for example, the adverse economic consequences of the order on the respondent, its employees, and other parties, as well as on the national interest in the competitiveness of U.S. businesses. An otherwise appropriate denial or exclusion order will be suspended on the basis of adverse economic consequences only if it is found that future export control violations are unlikely and if there are adequate measures (usually a substantial civil penalty) to achieve the necessary deterrent effect.

[69 FR 7870, Feb. 20, 2004, as amended at 75 FR 31681, June 4, 2010]

SUPPLEMENT NO. 2 TO PART 766—GUIDANCE ON CHARGING AND PENALTY DETERMINATIONS IN SETTLEMENT OF ADMINISTRATIVE ENFORCEMENT CASES INVOLVING ANTIBOYCOTT MATTERS

(a) *Introduction*.(1) *Scope*. This Supplement describes how the Office of Antiboycott Compliance (OAC) responds to violations of part 760 of the EAR "Restrictive Trade Practices or Boycotts" and to violations of part 762 "Recordkeeping" when the recordkeeping requirement pertains to part 760 (together referred to in this supplement as the "antiboycott provisions"). It also describes how BIS makes penalty determinations in the settlement of administrative enforcement cases brought under parts 764 and 766 of the EAR involving violations of the antiboycott provisions. This supplement does not apply to enforcement cases for violations of other provisions of the EAR.

(2) *Policy Regarding Settlement*. Because many administrative enforcement cases are resolved through settlement, the process of settling such cases is integral to the enforcement program. BIS carefully considers each settlement offer in light of the facts and circumstances of the case, relevant precedent, and BIS's objective to achieve in each case an appropriate level of penalty and deterrent effect. In settlement negotiations, BIS encourages parties to provide, and will give serious consideration to, information and evidence that the parties believe is relevant to the application of this guidance to their cases, to whether a violation has in fact occurred, and to whether they have a defense to potential charges.

(3) *Limitation*. BIS's policy and practice is to treat similarly situated cases similarly, taking into consideration that the facts and combination of mitigating and aggravating factors are different in each case. However, this guidance does not confer any right or impose any obligation regarding what posture or penalties BIS may seek in settling or

litigating a case. Parties do not have a right to a settlement offer or particular settlement terms from BIS, regardless of settlement postures BIS has taken in other cases.

(b) *Responding to Violations.* OAC within BIS investigates possible violations of Section 8 of the Export Administration Act of 1979, as amended ("Foreign Boycotts"), the antiboycott provisions of EAR, or any order or authorization related thereto. When BIS has reason to believe that such a violation has occurred, BIS may issue a warning letter or initiate an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution.

(1) *Issuing a warning letter.* Warning letters represent BIS's belief that a violation has occurred. In the exercise of its discretion, BIS may determine in certain instances that issuing a warning letter, instead of bringing an administrative enforcement proceeding, will fulfill the appropriate enforcement objective. A warning letter will fully explain the violation.

(i) BIS may issue warning letters where:

(A) The investigation commenced as a result of a voluntary self-disclosure satisfying the requirements of §764.8 of the EAR; or

(B) The party has not previously committed violations of the antiboycott provisions.

(ii) BIS may also consider the category of violation as discussed in paragraph (d)(2) of this supplement in determining whether to issue a warning letter or initiate an enforcement proceeding. A violation covered by Category C (failure to report or late reporting of receipt of boycott requests) might warrant a warning letter rather than initiation of an enforcement proceeding.

(iii) BIS will not issue a warning letter if it concludes, based on available information, that a violation did not occur.

(iv) BIS may reopen its investigation of a matter should it receive additional evidence or if it appears that information previously provided to BIS during the course of its investigation was incorrect.

(2) *Pursuing an administrative enforcement case.* The issuance of a charging letter under §766.3 of this part initiates an administrative proceeding.

(i) Charging letters may be issued when there is reason to believe that a violation has occurred. Cases may be settled before or after the issuance of a charging letter. See §766.18 of this part.

(ii) Although not required to do so by law, BIS may send a proposed charging letter to a party to inform the party of the violations that BIS has reason to believe occurred and how BIS expects that those violations would be charged. Issuance of the proposed charging letter provides an opportunity for the party and BIS to consider settlement of the

case prior to the initiation of formal enforcement proceedings.

(3) *Referring for criminal prosecution.* In appropriate cases, BIS may refer a case to the Department of Justice for criminal prosecution, in addition to pursuing an administrative enforcement action.

(c) *Types of administrative sanctions.* Administrative enforcement cases generally are settled on terms that include one or more of three administrative sanctions:

(1) A monetary penalty may be assessed for each violation as provided in §764.3(a)(1) of the EAR;

NOTE TO PARAGRAPH (c)(1): The maximum penalty is subject to adjustments under the Federal Civil Penalties Adjustment Act of 1990 (28 U.S.C. 2461, note (2000)), which are codified at 15 CFR 6.4. For violations that occurred before March 9, 2006, the maximum monetary penalty per violation is \$11,000. For violations occurring on or after March 9, 2006, the maximum monetary penalty per violation is \$50,000.

(2) An order denying a party's export privileges under the EAR may be issued, under §764.3(a)(2) of the EAR; or

(3) Exclusion from practice under §764.3(a)(3) of the EAR.

(d) *How BIS determines what sanctions are appropriate in a settlement—(1) General Factors.* BIS looks to the following general factors in determining what administrative sanctions are appropriate in each settlement.

(i) *Degree of seriousness.* In order to violate the antiboycott provisions of the EAR, a U.S. person does not need to have actual "knowledge" or a reason to know, as that term is defined in §772.1 of the EAR, of relevant U.S. laws and regulations. Typically, in cases that do not involve knowing violations, BIS will seek a settlement for payment of a civil penalty (unless the matter is resolved with a warning letter). However, in cases involving knowing violations, conscious disregard of the antiboycott provisions, or other such serious violations (e.g., furnishing prohibited information in response to a boycott questionnaire with knowledge that such furnishing is in violation of the EAR), BIS is more likely to seek a denial of export privileges or an exclusion from practice, and/or a greater monetary penalty as BIS considers such violations particularly egregious.

(ii) *Category of violations.* In connection with its activities described in paragraph (a)(1) of this supplement, BIS recognizes three categories of violations under the antiboycott provisions of the EAR. (See §760.2, §760.4 and §760.5 of the EAR for examples of each type of violation other than recordkeeping). These categories reflect the relative seriousness of a violation, with Category A violations typically warranting the

most stringent penalties, including up to the maximum monetary penalty, a denial order and/or an exclusion order. Through providing these categories in this penalty guidelines notice, BIS hopes to give parties a general sense of how it views the seriousness of various violations. This guidance, however, does not confer any right or impose any obligation as to what penalties BIS may impose based on its review of the specific facts of a case.

(A) The Category A violations and the sections of the EAR that set forth their elements are:

(1) Discriminating against U.S. persons on the basis of race, religion, sex, or national origin—§760.2(b);

(2) Refusing to do business or agreeing to refuse to do business—§760.2(a);

(3) Furnishing information about race, religion, sex, or national origin of U.S. persons including, but not limited to, providing information in connection with a boycott questionnaire about the religion of employees—§760.2(c);

(4) Evading the provisions of part 760—§760.4;

(5) Furnishing information about business relationships with boycotted countries or blacklisted persons—§760.2(d); and

(6) Implementing letters of credit—§760.2(f).

(B) The Category B violations and the sections of the EAR that set forth their elements are:

(1) Furnishing information about associations with charitable or fraternal organizations which support a boycotted country—§760.2(e); and

(2) Making recordkeeping violations—part 762.

(C) The Category C violation and the section of the EAR that sets forth its elements is: Failing to report timely receipt of boycott requests—§760.5.

(iii) *Violations arising out of related transactions.* Frequently, a single transaction can give rise to multiple violations. Depending on the facts and circumstances, BIS may choose to impose a smaller or greater penalty per violation. In exercising its discretion, BIS typically looks to factors such as whether the violations resulted from conscious disregard of the requirements of the antiboycott provisions; whether they stemmed from the same underlying error or omission; and whether they resulted in distinguishable or separate harm. The three scenarios set forth below are illustrative of how BIS might view transactions that lead to multiple violations.

(A) *First scenario.* An exporter enters into a sales agreement with a company in a boycotted country. In the course of the negotiations, the company sends the exporter a request for a signed statement certifying that the goods to be supplied do not origi-

nate in a boycotted country. The exporter provides the signed certification. Subsequently, the exporter fails to report the receipt of the request. The exporter has committed two violations of the antiboycott provisions, first, a violation of §760.2(d) for furnishing information concerning the past or present business relationships with or in a boycotted country, and second, a violation of §760.5 for failure to report the receipt of a request to engage in a restrictive trade practice or boycott. Although the supplier has committed two violations, BIS may impose a smaller mitigated penalty on a per violation basis than if the violations had stemmed from two separate transactions.

(B) *Second scenario.* An exporter receives a boycott request to provide a statement that the goods at issue in a sales transaction do not contain raw materials from a boycotted country and to include the signed statement along with the invoice. The goods are shipped in ten separate shipments. Each shipment includes a copy of the invoice and a copy of the signed boycott-related statement. Each signed statement is a certification that has been furnished in violation of §760.2(d)'s bar on the furnishing of prohibited business information. Technically, the exporter has committed ten separate violations of §760.2(d) and one violation of §760.5 for failure to report receipt of the boycott request. Given that the violations arose from a single boycott request, however, BIS may treat the violations as related and impose a smaller penalty than it would if the furnishing had stemmed from ten separate requests.

(C) *Third scenario.* An exporter has an ongoing relationship with a company in a boycotted country. The company places three separate orders for goods on different dates with the exporter. In connection with each order, the company requests the exporter to provide a signed statement certifying that the goods to be supplied do not originate in a boycotted country. The exporter provides a signed certification with each order of goods that it ships to the company. BIS has the discretion to penalize the furnishing of each of these three items of information as a separate violation of §760.2(d) of the EAR for furnishing information concerning past or present business relationships with or in a boycotted country.

(iv) *Multiple violations from unrelated transactions.* In cases involving multiple unrelated violations, BIS is more likely to seek a denial of export privileges, an exclusion from practice, and/or a greater monetary penalty than in cases involving isolated incidents. For example, the repeated furnishing of prohibited boycott-related information about business relationships with or in boycotted countries during a long period of time could warrant a denial order, even if a single instance of furnishing such information might

warrant only a monetary penalty. BIS takes this approach because multiple violations may indicate serious compliance problems and a resulting risk of future violations. BIS may consider whether a party has taken effective steps to address compliance concerns in determining whether multiple violations warrant a denial or exclusion order in a particular case.

(v) *Timing of settlement.* Under § 766.18 of this part, settlement can occur before a charging letter is served, while a case is before an administrative law judge, or while a case is before the Under Secretary for Industry and Security under § 766.22 of this part. However, early settlement—for example, before a charging letter has been filed—has the benefit of freeing resources for BIS to deploy in other matters. In contrast, for example, the BIS resources saved by settlement on the eve of an adversary hearing under § 766.13 of this part are fewer, insofar as BIS has already expended significant resources on discovery, motions practice, and trial preparation. Given the importance of allocating BIS resources to maximize enforcement of the EAR, BIS has an interest in encouraging early settlement and will take this interest into account in determining settlement terms.

(vi) *Related criminal or civil violations.* Where an administrative enforcement matter under the antiboycott provisions involves conduct giving rise to related criminal charges, BIS may take into account the related violations and their resolution in determining what administrative sanctions are appropriate under part 766 of the EAR. A criminal conviction indicates serious, willful misconduct and an accordingly high risk of future violations, absent effective administrative sanctions. However, entry of a guilty plea can be a sign that a party accepts responsibility for complying with the antiboycott provisions and will take greater care to do so in the future. In appropriate cases where a party is receiving substantial criminal penalties, BIS may find that sufficient deterrence may be achieved by lesser administrative sanctions than would be appropriate in the absence of criminal penalties. Conversely, BIS might seek greater administrative sanctions in an otherwise similar case where a party is not subjected to criminal penalties. The presence of a related criminal or civil disposition may distinguish settlements among civil penalty cases that appear to be otherwise similar. As a result, the factors set forth for consideration in civil penalty settlements will often be applied differently in the context of a “global settlement” of both civil and criminal cases, or multiple civil cases involving other agencies, and may therefore be of limited utility as precedent for future cases, particularly those not involving a global settlement.

(vii) *Familiarity with the Antiboycott Provisions.* Given the scope and detailed nature of the antiboycott provisions, BIS will consider whether a party is an experienced participant in the international business arena who may possess (or ought to possess) familiarity with the antiboycott laws. In this respect, the size of the party’s business, the presence or absence of a legal division or corporate compliance program, and the extent of prior involvement in business with or in boycotted or boycotting countries, may be significant.

(2) *Specific mitigating and aggravating factors.* In addition to the general factors described in paragraph (d)(1) of this supplement, BIS also generally looks to the presence or absence of the specific mitigating and aggravating factors in this paragraph in determining what sanctions should apply in a given settlement. These factors describe circumstances that, in BIS’s experience, are commonly relevant to penalty determinations in settled cases. However, this listing of factors is not exhaustive and BIS may consider other factors that may further indicate the blameworthiness of a party’s conduct, the actual or potential harm associated with a violation, the likelihood of future violations, and/or other considerations relevant to determining what sanctions are appropriate. The assignment of mitigating or aggravating factors will depend upon the attendant circumstances of the party’s conduct. Thus, for example, one prior violation should be given less weight than a history of multiple violations, and a previous violation reported in a voluntary self-disclosure by a party whose overall compliance efforts are of high quality should be given less weight than previous violation(s) not involving such mitigating factors. Some of the mitigating factors listed in this paragraph are designated as having “great weight.” When present, such a factor should ordinarily be given considerably more weight than a factor that is not so designated.

(i) *Specific mitigating factors.*

(A) *Voluntary self-disclosure.* (GREAT WEIGHT) The party has made a voluntary self-disclosure of the violation, satisfying the requirements of § 764.8 of the EAR.

(B) *Effective compliance program.* (GREAT WEIGHT)

(1) *General policy or program pertaining to Antiboycott Provisions.* BIS will consider whether a party’s compliance efforts uncovered a problem, thereby preventing further violations, and whether the party has taken steps to address compliance concerns raised by the violation, including steps to prevent recurrence of the violation, that are reasonably calculated to be effective. The focus is on the party’s demonstrated compliance with the antiboycott provisions. Whether a party has an effective export compliance program covering other provisions of the EAR is not relevant as a mitigating factor.

In the case of a party that has done previous business with or in boycotted countries or boycotting countries, BIS will examine whether the party has an effective antiboycott compliance program and whether its overall antiboycott compliance efforts have been of high quality. BIS may deem it appropriate to review the party's internal business documents relating to antiboycott compliance (e.g., corporate compliance manuals, employee training materials).

(2) *Compliance with reporting and record-keeping requirements.* In the case of a party that has received reportable boycott requests in the past, BIS may examine whether the party complied with the reporting and recordkeeping requirements of the antiboycott provisions.

(C) *Limited business with or in boycotted or boycotting countries.* The party has had little to no previous experience in conducting business with or in boycotted or boycotting countries. Prior to the current enforcement proceeding, the party had not engaged in business with or in such countries, or had only transacted such business on isolated occasions. BIS may examine the volume of business that the party has conducted with or in boycotted or boycotting countries as demonstrated by the size and dollar amount of transactions or the percentage of a party's overall business that such business constitutes.

(D) *History of compliance with the Antiboycott Provisions of the EAR.*

(1) BIS will consider it to be a mitigating factor if:

(i) The party has never been convicted of a criminal violation of the antiboycott provisions;

(ii) In the past 5 years, the party has not entered into a settlement or been found liable in a boycott-related administrative enforcement case with BIS or another U.S. government agency;

(iii) In the past 3 years, the party has not received a warning letter from BIS relating to the antiboycott provisions; or

(iv) In the past 5 years, the party has not otherwise violated the antiboycott provisions.

(2) Where necessary to ensure effective enforcement, the prior involvement in violations of the antiboycott provisions of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in determining whether these criteria are satisfied. When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations that the acquired business committed before the acquisition, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

(E) *Exceptional cooperation with the investigation.* The party has provided exceptional

cooperation to OAC during the course of the investigation.

(F) *Clarity of request to furnish prohibited information or take prohibited action.* The party responded to a request to furnish information or take action that was ambiguously worded or vague.

(G) *Violations arising out of a party's "passive" refusal to do business in connection with an agreement.* The party has acquiesced in or abided by terms or conditions that constitute a prohibited refusal to do business (e.g., responded to a tender document that contains prohibited language by sending a bid). See "active" agreements to refuse to do business in paragraph (d)(2)(ii)(I) of this supplement.

(H) *Isolated occurrence of violation.* The violation was an isolated occurrence. (Compare to long duration or high frequency of violations as an aggravating factor in paragraph (d)(2)(ii)(F) of this supplement.)

(ii) *Specific Aggravating Factors.*

(A) *Concealment or obstruction.* The party made a deliberate effort to hide or conceal the violation. (GREAT WEIGHT)

(B) *Serious disregard for compliance responsibilities.* (GREAT WEIGHT) There is evidence that the party's conduct demonstrated a serious disregard for responsibilities associated with compliance with the antiboycott provisions (e.g.: knowing violation of party's own compliance policy or evidence that a party chose to treat potential penalties as a cost of doing business rather than develop a compliance policy).

(C) *History of compliance with the Antiboycott Provisions.*

(1) BIS will consider it to be an aggravating factor if:

(i) The party has been convicted of a criminal violation of the antiboycott provisions;

(ii) In the past 5 years, the party has entered into a settlement or been found liable in a boycott-related administrative enforcement case with BIS or another U.S. government agency;

(iii) In the past 3 years, the party has received a warning letter from BIS relating to the antiboycott provisions; or

(iv) In the past 5 years, the party has otherwise violated the antiboycott provisions.

(2) Where necessary to ensure effective enforcement, the prior involvement in violations of the antiboycott provisions of a party's owners, directors, officers, partners, or other related persons may be imputed to a party in determining whether these criteria are satisfied.

(3) When an acquiring firm takes reasonable steps to uncover, correct, and disclose to BIS conduct that gave rise to violations that the acquired firm committed before being acquired, BIS typically will not take such violations into account in applying this factor in settling other violations by the acquiring firm.

(D) *Familiarity with the type of transaction at issue in the violation.* For example, in the case of a violation involving a letter of credit or related financial document, the party routinely pays, negotiates, confirms, or otherwise implements letters of credit or related financial documents in the course of its standard business practices.

(E) *Prior history of business with or in boycotted countries or boycotting countries.* The party has a prior history of conducting business with or in boycotted and boycotting countries. BIS may examine the volume of business that the party has conducted with or in boycotted and boycotting countries as reflected by the size and dollar amount of transactions or the percentage of a party's overall business that such business constitutes.

(F) *Long duration or high frequency of violations.* Violations that occur at frequent intervals or repeated violations occurring over an extended period of time may be treated more seriously than a single violation or related violations that are committed within a brief period of time, particularly if the violations are committed by a party with a history of business with or in boycotted and boycotting countries. (Compare to isolated occurrence of violation in paragraph (d)(2)(i)(H) of this supplement.)

(G) *Clarity of request to furnish prohibited information or take prohibited action.* The request to furnish information or take other prohibited action (e.g., enter into agreement to refuse to do business with a boycotted country or entity blacklisted by a boycotting country) is facially clear as to its intended purpose.

(H) *Violation relating to specific information concerning an individual entity or individual.* The party has furnished prohibited information about business relationships with specific companies or individuals.

(I) *Violations relating to "active" conduct concerning an agreement to refuse to do business.* The party has taken action that involves altering, editing, or enhancing prohibited terms or language in an agreement to refuse to do business, including a letter of credit, or drafting a clause or provision including prohibited terms or language in the course of negotiating an agreement to refuse to do business, including a letter of credit. See "passive" agreements to refuse to do business in paragraph (d)(2)(i)(G) of this supplement.

(e) *Determination of Scope of Denial or Exclusion Order.* In deciding whether and what scope of denial or exclusion order is appropriate, the following factors are particularly relevant: The presence of mitigating or aggravating factors of great weight; the degree of seriousness involved; the extent to which senior management participated in or was aware of the conduct in question; the number of violations; the existence and seriousness

of prior violations; the likelihood of future violations (taking into account relevant efforts to comply with the antiboycott provisions); and whether a civil monetary penalty can be expected to have a sufficient deterrent effect.

(f) *How BIS Makes Suspension and Deferral Decisions—(1) Civil Penalties.* In appropriate cases, payment of a civil monetary penalty may be deferred or suspended. See §764.3(a)(1)(iii) of the EAR. In determining whether suspension or deferral is appropriate, BIS may consider, for example, whether the party has demonstrated a limited ability to pay a penalty that would be appropriate for such violations, so that suspended or deferred payment can be expected to have sufficient deterrent value, and whether, in light of all the circumstances, such suspension or deferral is necessary to make the impact of the penalty consistent with the impact of BIS penalties on other parties who committed similar violations.

(2) *Denial of Export Privileges and Exclusion from Practice.* In deciding whether a denial or exclusion order should be suspended, BIS may consider, for example, the adverse economic consequences of the order on the party, its employees, and other persons, as well as on the national interest in maintaining or promoting the competitiveness of U.S. businesses. An otherwise appropriate denial or exclusion order will be suspended on the basis of adverse economic consequences only if it is found that future violations of the antiboycott provisions are unlikely and if there are adequate measures (usually a substantial civil monetary penalty) to achieve the necessary deterrent effect.

[72 FR 39006, July 17, 2007]

PART 768—FOREIGN AVAILABILITY DETERMINATION PROCEDURES AND CRITERIA

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SUPPLEMENT NO. 1 TO PART 768—EVIDENCE OF FOREIGN AVAILABILITY